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80-1768
No. .....

In the Supreme Court of the United States

October Term, 1980

THOMAS LANCI,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Eighth District Court of Appeals
For Cuyahoga County, Ohio

JAMES R. WILLIS
Bond Court Building, Suite 1609
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Attorney for Petitioners

JOHN T. CORRIGAN
Cuyahoga County Prosecutor
Justice Center Complex
1200 Ontario Street
Cleveland, Ohio 44113
Attorney for Respondent

QUESTIONS PRESENTED

I. Whether an accused is unavoidably victimized by a prejudicial spill-over effect from the fact that at his trial for various substantive offenses, including aggravated murder and aggravated arson, he is also tried for the organized crime offense, which charge was predicated on an unconstitutional statute?

II. Was due process violated where proof of the crime for which an accused was acquitted was also an essential element of, and was necessary to sustain, a conviction of the crime for which he was convicted?

III. Whether the accused was denied due process, and otherwise substantially prejudiced, in the wake of any of the following circumstances that developed or occurred during his trial:

(A) The State argued in support of the admission of evidence showing other crimes, wrongs or "similar acts," that such evidence was properly admitted: (1) as evidence in furtherance of a "conspiracy", (2) as evidence of "similar acts," and (3) as evidence tending to prove the existence of a criminal syndicate and thus a violation of a statute later declared unconstitutional, where the trial judge fails to prevent by cautionary instructions the possible misuse of such evidence by the jury;

(B) There is admitted as substantive proof considerable evidence showing other crimes and wrongs, which evidence did not qualify for admission under the State's similar acts statute (*R.C. of Ohio*, §2945.59), the statute under which such evidence was tendered;

(C) Assuming the evidence referred to above qualified for admission under the above-indicated statute, the admission of such evidence as substantive proof of the charges made in the indictment cannot be justified in law, logic or common sense?

IV. Whether an accused is denied the effective assistance of counsel (A) when, as a result of his counsel's failure to request instructions limiting such evidence to the purposes enumerated in the relevant statute, considerable evidence was considered as substantive proof of the charges for which he was convicted; and (B) when, as a result of counsel's failure to request an instruction, evidence admitted solely on the basis of a charge for which the court acquitted the defendant is permitted to be considered by the jury as substantive proof of the charges.

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An accused is denied the effective assistance of counsel (A— when, as a result of his counsel's failure to request instructions limiting such evidence to the purposes enumerated in §2945.59, considerable evidence was considered as substantive proof of the charges for which the defendant was convicted; and (B) when, as a result of counsel's failure to request an instruction, evidence admitted solely on the basis of a charge for which the court acquitted the defendant is permitted to be considered by the jury as substantive proof of the charges 39

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PETITION FOR WRIT OF CERTIORARI
To the Eighth District Court of Appeals
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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Thomas Lanci, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on February 20, 1981; when the Supreme Court denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B", *infra*, pp. A1 and A2 in the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C", p. A3.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on February 20, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "D", p. A26.

STATEMENT OF THE CASE [1]

The underlying factual situation in this appeal is set forth in considerable detail in the Opinion rendered by the Court of Appeals (see Appendix "C", pp. A3 to A25).

While there are serious flaws in some of the assertions, which the court treats as "facts" in drawing certain conclusions as to the occurrence of various events, there appears to be no real need, beyond the insertion of a few rudimentary "facts," to correctly structure for this Court the issues in this cause. So postured the facts and circumstances critical to this cause include the following:

First, that Danny Greene was, as the court concluded to be a fact, killed by "a dynamite bomb" that "was detonated by remote control" as he was about to enter his car (*id.*, pp. A3 to A25). This fact, which cannot possibly be disputed, established that Danny Greene was killed in the wake of an explosion.

Second, that considerable evidence was developed to show, if it did, that Ray Ferrito had been recruited by Licavoli and others to kill Danny Greene. *And*, according to the State's evidence, Louis Aratari, who in turn recruited Ronald

[1] Whenever reference is made in this petition to a page in the Record in the trial court, it will be preceded by the prefix "R". References to the Appendix to this petition, are noted as "Appendix___ p. ___."

Guiles, was himself recruited by Thomas Lanci to join in the conspiracy to kill Danny Greene *(id.,* at 23-24). Aratari's testimony on the salient facts in his evidence was disputed by considerable defense evidence -- not just that presented by this appellant.

Third, that after the lengthy presentation by the State, the trial court *denied* appellant Lanci's Motion for Judgment of Acquittal. This *fact* literally forced Lanci not only to present evidence as to the substantive offenses that were eventually submitted to the jury, but also with reference to Count III. This count charged him with being the member of a criminal "syndicate" – the Organized Crime Charge.

The Motion for Judgment of Acquittal at the close of the State's case certainly was responsible for Thomas Lanci testifying *and,* if it happened, being impeached on what even the Court of Appeals concedes were collateral points. (Also, the facts show the trial court had previously rejected Lanci's pretrial contention that the Organized Crime statute was indeed unconstitutional, a determination this Court was later to make in *State v. Young,* 62 Ohio St. 2d 370 [1980]).

Fourth, that considerable evidence was admitted *over objections as substantive proof,* and so considered by the jury, has been declared by the Court of Appeals to have been solely the fault of the various defense counsel who did not request the limiting instructions that Lanci was entitled to have given to the jury.

Fifth, that when the trial court ultimately granted the Motion for Judgment of Acquittal on the Organized Crime count at the close of all the evidence, this circumstance (if the appellate court's rationale can be credited) imposed a duty on defense counsel, *which was waived,* to urge the considerable evidence admitted *solely* as proof of the Organized Crime offense. (The specific contention has been made to the appellate court that these particular findings [as referred to in this and the previous enumeration] resulted, if their analysis is correct, in *the lack of effective assistance of counsel* – serious Sixth Amendment violations.)

Sixth, that according to the appellate court, absent any showing, doubtless by the defendant, that a miscarriage of justice occurred because the jury was not properly instructed in these critical areas, although due to the failures of defense counsel, *the claim of ineffective assistance of counsel can be rejected* by them on the basis of harmlessness.

Seventh, that also according to the Opinion below, there is no inconsistency, or redundancy, *and* there is simply nothing wrong with the fact that the jury found Lanci *not guilty* of Aggravated Arson (Count I) and *not guilty* of the aggravating circumstances – *i.e.*, Aggravated Arson, of the Aggravated Murder charge itself *and* a verdict finding Lanci guilty of "Aggravated Murder of Danny Greene *while committing or attempting to commit...Aggravated Arson.*" (Appendix "C", p. A3 [emphasis supplied]).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The issues in this case involve several substantial constitutional questions. In addition, the case is one of great public and general interest. In this latter regard, as will be developed below in somewhat expanded detail, among other reasons for the considerable public and general interest in this case is the fact that this so-called "Mafia trial" had serious ethnic overtones. These were literally fanned by the media. Then there is the fact that the Federal government heavily contributed its energies both in resources and manpower, in the investigation and to the prosecution itself. Additionally, the considerable information furnished the media by the Government and the State has created the belief (whether founded or otherwise, yet shared by many) that regardless of the occurrences of any flaws in the actual trials, there is simply no way any of these convictions could ever be reversed in a State court. The argument being made is that no judge would risk being investigated by the Government, or abused by the media,[2] by reversing any of these convictions since to do so would entail possibly being critical of Federal agents, trial judges and, most assuredly, certain of the trial prosecutors.

While these rumors are surely unfounded, no one can deny that the media, both locally and nationally, influenced its constituents to believe these trials had something to do with the Mafia. Since this case was tried on an Organized Crime theory, based on a statute later declared unconstitutional in this Court,[3] the effect here has been that evidence admitted solely because of the Organized Crime charge unavoidably contributed to the ultimate guilty verdicts returned in this case.

For our part, as fully developed below, the evidence admitted because of the Organized Crime statute, and other "collateral" evidence not properly considered as substantive proof, was used by the court of appeals as a *"wild card"* in

2 See *e.g.*, the article entitled "The Animal and the Honorable," Cleveland Magazine, p. 14 (October, 1980).

3 *State v. Young*, 62 Ohio St. 2d 370 (1980).

its rush toward the judgment of affirmance being challenged in this case. The further fact that the appeals court would actually blame defense counsel for the advent of even some of these flaws makes Lanci's claim here that he received the ineffective assistance of counsel still another viable constitutional issue.

I. An Accused Is Unavoidably Victimized By A Prejudicial Spill-Over Effect From The Fact That, At His Trial For Various Substantive Offenses, Including Aggravated Murder And Aggravated Arson, He Is Also Tried For The Organized Crime Offense -- A Charge Predicated On An Unconstitutional Statute.

(A)

Basically, what is being contended here is that Thomas Lanci was necessarily prejudiced by the fact that a considerable amount of the evidence admissible *solely* on the basis of the Organized Crime Count, which count was based on an unconstitutional statute (*State v. Young*, 62 Ohio St. 2d 370 [1980]), would have been inadmissible not only if he had been tried alone as contemplated by *R.C. of Ohio*, §2945.20,[4] but even if he had been tried jointly with his co-defendants on the Murder and Arson offenses uninfluenced by the fact that they were also being tried for Organized Crime. Even this is not all. Solely because of the presence of the Organized Crime Charge, Lanci's trial strategy (including his decision to testify) was necessarily and substantially affected. Since Lanci's joinder with certain other defendants was only proper if the Organized Crime charge was valid, the Organized Crime statute being unconstitutional, the decisions of *Price v. George*, 398 U.S. 323 (1970), and *United States ex. rel Hetenyi v. Wilkins*, 348 F. 2d 844 (2d Cir. 1965), become most relevant.

[4] *R.C. of Ohio*, §2945.20 expressly provides that, absent good cause, persons jointly indicted for "capital murder offense should not be jointly tried." Given the fact that *Bell v. Ohio*, 438 U.S. 637 and *Lockett v. Ohio*, 438 U.S. 586 were only decided on July 3, 1978, it can hardly be denied that this case was a capital case when the trial commenced.

Though distinguishable from the facts here, these cases show beyond dispute that significant prejudice perforce results from the joinder of a constitutionally barred charge (here, the Organized Crime charge) with permissible charges. Such joinder raises a problem of constitutional proportion. In this case then, the fact that the trial court specifically instructed the jury on conspiracy and complicity theories as to the two substantive offenses verifies the existence of a critical issue as to whether this petitioner was prejudiced in a constitutional sense. This fact bars any possible conclusion that the same could be viewed as harmless. *Chapman v. California*, 386 U.S. 24 (1967).

In amplifying the position here being taken, it should be understood that we recognize the *Price* and *Hetenyi* decisions both involved the joinder of lesser included offenses with greater ones stemming from the same transaction. In *Price*, where there was a second conviction on the lesser charge, the Court concluded that the constitutional right there involving (double jeopardy) was "cast in terms of the risk of hazard of trial or conviction, not the ultimate consequences of the verdict" (398 U.S., at 311). The *Hetenyi* Court, in dealing with the same issue, concluded that:

"Both the existence of this possibility of prejudice and the fact that it arises from a violation of the accused's constitutional rights render the process which resulted in his detention constitutionally inadequate, less than that which is constitutionally due." 348 F.2d, at 864.

Obviously then, "the question here is not whether the accused was actually prejudiced [by the inclusion of the Organized Crime charge in this indictment], but whether there is a reasonable *possibility* that he was prejudiced" (348 F. 2d, at 864 [emphasis in original]).

Thus, we contend that because the petitioner was forced to defend against the Organized Crime charge, he was victimized by a prejudicial "spillover." (Since this charge was based on an unconstitutional statute, the evidence relating thereto, or even the existence of the charge itself, by right should have played no role in the determination of the issues involved in the other charges.)

In addition, we contend Lanci's defense to the various substantive charges was further prejudiced by the fact that his defensive energies were dissipated by the need to devote so much time and effort to the numerous evidentiary and other related issues raised by the Organized Crime charge. This is particularly so with reference to the mountains of prejudicial evidence showing activities by others which constituted the bulk of the evidence in this case dealing with the theft of certain FBI documents.

This contention is emphasized by the court's ruling (R 5748) specifically indicating at the close of the State's case that, in his judgment, "there was sufficient credible evidence both direct and circumstantial to support" the charge of Organized Crime--a ruling that required this defendant to present a defense to this charge. The fact that this ruling also influenced Lanci's decision to testify is only an aspect of the problem.

(B)

In emphasizing the point here, it should be noted that the State contended the Organized Crime Count was based on the fact that there was involved, as between those on trial and others, a "criminal syndicate" (R 7165) and that the facts here showed "evidence of gambling" on "a continuing basis or even a sporadic basis" (R 7167).

Thus, it is most significant that, despite his original denial of the Rule 29 Motion when the same was made at the close of the State's case (R 5749), the trial court ultimately dismissed the Organized Crime Count. Implicit in his ultimate determination to dismiss the Organized Crime Count are certain very critical findings of fact. Here, the court stated:

> THE COURT: All right. Okay. Anyone have anything further?
>
> I am persuaded here that the State has not established the third count of the indictment by introducing proof that five or more persons, among them these three

defendants, collaborated to promote or engage in the offense on a continuing basis to the offense of gambling.

The first part of the arguments that you made, I would agree with, those made by Mr. Cain and Mr. Lipold. But I have to look at the whole statute, and the evidence that is before this Court, which under Rule 29,...now that I have a chance to look at all of the evidence in this case, I am persuaded that the third count should not be submitted to the jury.

I do not know how I could submit to the jury an argument that five or more people are involved in a criminal syndicate without naming them, without allowing them to refer or make inferences that we are referring to six people who have already been found innocent.

And secondly, *I do not think that the evidence is sufficient, based upon what has been stated here, and giving Mr. Ferrito's testimony the widest possible inference in favor of the State, that he has established the corpus of the crime of a gambling offense, and that these people have been involved in it.*

Okay. For those reasons the Court will dismiss the third count of the indictment against each defendant.

(R 7172-7174 [emphasis added].)

In its discussion of the above points, the appellate court concluded its analysis with the contention that evidence admissible *solely* because of the Organized Crime charge (based, as it was, on an unconstitutional statute) had prejudiced the defendants with the bland *assertion* that "[they] waived this possible irregularity in the proceedings below" (Appendix "C", p. A3).

Hopefully this Court will understand our assailment of the position as expressed throughout Section IV of the Opinion is total. *First* of all, there is really no need to *assume*, as the Court does, "that the jury considered in its deliberations evidence probative only of the dismissed count" *(ibid).* The fact that this happened is clear, unambiguous, and beyond dispute. For the court doubtless must have been convinced this is so. Otherwise, it would not have written that "much, if not all, of the evidence admitted as probative of the organized crime count was also probative of the aggravated arson and aggravated murder counts" *(ibid).* On the other hand, had the court been persuaded otherwise, the word "all" instead of "much" would have been used in the independent clause of the sentence referred to and there would have been no need for any subordination.

This brings us to the appellate court's ultimate conclusion, in this segment of its Opinion, to the effect the defendants "waived this *possible* irregularity" *(ibid* [emphasis supplied]*) and* that, in any event, "the court's failure to instruct the jury was harmless." Obviously, the court somehow satisfied itself that the reason the trial court did not strike or otherwise correctly deal with *the evidence* bearing on the Organized Crime charge was because defense counsel did not make the request that he do so *(ibid).* Implicit in the court's declaration is the rather farfetched suggestion that the trial court would have acted appropriately -- or at least differently.

Our position on this is that only a mistrial was proper since no curative instruction could possibly have corrected the situation. This is so for a number of reasons including the impossibility of the task of compartmentalizing the evidence for exclusion, or whatever, and then unringing the bell. However, and apart from the above contention, even a cursory reading of the Record reveals a confutation of the appellate court's incredible conclusion that no request for any limiting instructions, as to this evidence, was made (Appendix "C", p. A3). Specifically, among numerous other motions and objections previously made dealing with this

testimony, the Record *also* shows that, in the wake of the dismissal of Count III, *counsel specifically* asked the court on more than one occasion for directions as to how the *testimony* bearing on the Organized Crime charge should be dealt with. Here, the Record shows for all to see:

> MR. FRIEDMAN: May I ask the Court a question?
>
> THE COURT: Some of you have a 4:00 hearing. We have got to finish the arguments on the first and second count; so would you go briefly?
>
> MR. FRIEDMAN: May I just ask the Court one question regarding that? I appreciate it, and I thank the Court for its ruling.
>
> In argument, Your Honor, *will the Court limit that evidence that came in*, and *I realize the Jury's already heard it*, but as far as limiting us as to, or limiting the State or the Defense from suggesting or going into any of the arguments or any of the *testimony of any witness that related to the third count.*

Also, the Record shows that, after further debate on other housekeeping matters, the defense again brought up the question as to restrictions the court should put on the evidence admitted on the basis of the Organized Crime charge. Here the Record shows:

> MR. FRIEDMAN: Your Honor, I would join in, but also I would just like to make one more suggestion and I will be finished, Your Honor.

I would also move the Court at this time, for the record to limit the prosecution from making any reference in their closing arguments to any matters relating to count number three, engaging in organized crime, including the exhibits that were introduced for that particular count.

THE COURT: All right.

MR. CARNES: I don't think, Your Honor, I join in that, but I don't think that's a matter that can be left up to the discretion of counsel. And I would hereby request that the Court now go over all the exhibits and rule what exhibits can be commented on and which ones will be excluded.

(R 7212-7213)

* * *

(Thereupon, the jury was escorted back into the courtroom, whereupon, the following proceedings were had in open Court.)

THE COURT: Good afternoon. We have been working, and I hope you have enjoyed the day's rest.

* * *

Now, ladies and gentlemen of the jury, I am withdrawing from your consideration the charge of organized crime, which is the third count in the indictment.

The attorneys therefor will argue the charges of aggravated arson and aggravated murder, and the Court will instruct you only upon those two charges.

Now, why the Court has withdrawn the third count should not be discussed or speculated upon in any way as you listen to final argument or when you retire to deliberate.

O.K. All right. Now, if you are ready, Mr. Lipold, you can proceed.

MR. CARNES: Judge, may I approach the bench before he begins?

THE COURT: All right.

(R 7224)

* * *

THE COURT: There are objections to various exhibits, particularly the checks and so forth.

MR. CARNES: State's Exhibit 101-C, State's Exhibit 101-B, State's Exhibit 204, and State's Exhibit – I don't know what it is.

MR. FULTON: *This is part of the documents with Lanci's prints on them. This is one of them.*

MR. CARNES: Which number is it? Is 109.

MR. FRIEDMAN: 106, isn't it?

MR. CARNES: No, it's 109.

MR. VALORE: 109.

THE COURT: All right. The Court rules that these exhibits may be used by the prosecutor in final argument.

Taken exception by all three defendants.

MR. CARNES: Judge, in the aspect of courtesy to Mr. Lipold when this is mentioned during the course of the final argument, we will not object but –

THE COURT: *You will take a continuing objection to any references to exhibits which might have some relation to the dismissed third count.*

MR. CARNES: *Fine. Thank you, Your Honor.*

(R 7226)

A liberal reading of the above quotes shows counsel *did* request the court place restrictions on the testimony that bore solely on the Organized Crime count – the dismissed charge.

Again, as had been argued before to the court, the obligation of the trial judge to sufficiently charge the jury on the various issues in the trial, including instructing them as to any limitations on the evidence, is a particularly heavy responsibility. This responsibility exists apart from, and even in the absence of, any request or objections by defense counsel. Applied here, particularly since this cause was tried as a capital case, it is simply unfair for this Court to declare this petitioner was to carry the whole blame. At the very least, to the extent the defense may have had a shared responsibility with the court to see to it that the jury was properly instructed, such was surely discharged when counsel *specifically* asked the court to indicate the limitations it would impose on the "testimony of any witness that related to the third count" (R 7175).

But even this is not all. The fact that the trial court expressly authorized the prosecutor to argue (as shown above) some of the exhibits that could only have been admitted in support of the third count shows, beyond cavil, that the making of a more specific request would have, in any event, been an exercise in futility.

The court below has concluded: (1) that "appellants failed below to request that the trial court eliminate...[any] potential for prejudice by instructing the jury to not consider evidence probative of the Organized Crime count only" and, for that reason, there was no gross infirmity in the trial. Also, the court concluded that, in any event, they were not

prejudiced because the error did not result in a "manifest miscarriage of justice." (Appendix "C", p. A3).

Again, the contention is being made that it was the trial court who allowed the defendants in this trial to be prejudiced by evidence that tended to show, as against those charged as "conspirators" and syndicate members, the commission of other crimes for which they had not been charged.

In defending the admission of this evidence, the Court should understand the State argued to the appeals court that the trial court properly admitted this evidence because it was "relevant to show the conspiracy to kill not only Danny Greene but also his associates" *(Answer Brief,* p. 22). Indeed, as put by our erudite prosecutor, this evidence *was not* " 'other acts,' but a series of acts within a continuing course of conduct to accomplish criminal purpose of which this death was one purpose" *(id.,* at 24).

However, in ignoring the issue as framed by the adverse contentions of the parties, the court of appeals proceeded to tell us something entirely different happened at the trial. We are told not only that the evidence (being referred to) was actually admitted by the trial judge under favor of *R.C. of Ohio,* §2945.59 but also that, had the request been made by the defense as it should have been, the trial judge surely would have given the jury "an instruction on the limited purpose for which this evidence" could only "be considered by the jury." Since none was requested by the defendants, as the court of appeals saw it, "they waived any error in the court's omission to so instruct" (Appendix "C", p. A3). Not only this, we are told no "manifest miscarriage of justice" could possibly have resulted *(id.,* at A3).

II Where Proof Of The Crime For Which The Accused Was Acquitted Was Also An Essential Element Of, And Is Necessary To Sustain, A Conviction Of The Crime For Which He Was Convicted; The Guilty Verdict Must Be Regarded As Invalid.

In this case, the State adamantly contended that a conspiracy existed as between the petitioner and others to kill Danny Greene. Given the acquittal of Licavoli, Lonardo, Sinito and Calabrese in the previous trial; one must surely question the ability of the State to still contend those indicated above were nonetheless members of such conspiracy. Seemingly, a routine application of the collateral estoppel doctrine of *Ashe v. Swenson,* 397 U.S. 436, 442 (1970), should have barred the State from even asserting to this jury such a contention as a viable basis for a conviction of those who were on trial in this case.

The starting point for this analysis is (a) the aforementioned acquittals, (b) the jury's acquittal of Calandra in this trial, augmented as it was by the court's acquittal of Lanci, Ciarcia and Calandra of the Organized Crime charge before the case was submitted to the jury, (c) the jury's acquittals of Lanci and Ciarcia on Count I, the Aggravated Arson charge *and* (d) their acquittal on both specifications--that is, "for hire" and/or while committing Aggravated Arson. These circumstances create issues that appear both novel and complicated.

The question then is whether these various acquittals (to which reference has been made) of the precise crime that formulated the sole and only possible predicates for the Aggravated Murder charge for which Lanci and Ciarcia were convicted -- that is, the Aggravated Arson charge and the specifications under the Murder charge rendered the Murder verdict so inconsistent as to be repugnant and thus require reversal and dismissal of the indictment? See *People v.*

Edwards, 402 N.Y.S. 2d 619, 61 A.D. 2d 1016 (1978); *People v. Perez*, 400 N.Y.S. 2d 559, 60 A.D. 2d 656 (1977); *In R. Kirby*, 50 Ill. 3d 915, 365 N.E. 2d 365 (1977) and *State v. Cates*, 223 Kan. 724, 576 P. 2d 657 (1978).

In *Edwards*, the New York Court specifically held that:

> "[T]he acquittal of the lesser included offense of grand larceny, coupled with the defendant's conviction of the higher offense of robbery, renders the verdict repugnant and requires reversal and dismissal of the indictment" (402 N.Y.S. 2d, at 620).

In *Perez*, the same New York court determined that:

> "Defendant's involvement in the transaction was so clearly established and so well documented that the only way in which he could have been acquitted of criminal sale of heroin was for the jury to find that he was an agent of the police officer who purchased the heroin. Having accepted the defense of agency, the jury could not properly have found defendant guilty of criminal possession of a controlled substance with intent to sell...Accordingly, the conviction of criminal possession in the third degree must be reduced to conviction of criminal possession of a controlled substance in the seventh degree" (400 N.Y.S. 2d, at 559).

In *Kirby*, the Illinois Court took a comparable position when it concluded that:

> "Respondent was acquitted on the charges of battery negat[ing] any finding of mob action based on the use of force or violence by two or more persons as well as any theory of accountability by Alfred Williams."

Hence, guilt of mob action was not established.

In the Kansas case cited above *(i.e., Cates)* the court reasoned that:

> "[A]s the case turned out defendant was acquitted of the firearms charge. The jury, no doubt, found the barrel of the gun in excess of twelve inches. Therefore, the possession of the gun by defendant did not amount to a felony in the minds of the jurors."

In fully assaying the thrust of our contentions here, consider California's approach to situations of this ilk. Here we refer to §954, *California Penal Code,* which expressly provides that "an acquittal on one or more counts shall not be deemed an acquittal on any other count. Doubtless, this statute was specifically enacted to avoid any assumptions that a verdict on a particular count necessarily disclosed what the jury was thinking. Yet, despite this statute (and Ohio seemingly does not have a comparable statute) the California Courts recognize that:

> "...[T]here is a limited judicial exception to this rule where all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty...This occurs, for example, where a conspiracy count alleges as the only overt act a crime set forth specifically in another count, and the defendant is found not guilty of the specific crime, but is found guilty of conspiracy; such an inconsistency invalidates the conspiracy conviction." *People v. Hamilton,* 80 Cal. App. 3d 124, 145 Cal. Rptr. 429, 432 (1978).

We concede there is certainly authority for the position that "[c]onsistency in a verdict is not necessary." And we agree that "[e]ach count in an indictment is regarded as a separate indictment." *Dunn v. United States*, 284 U.S. 390 (1932). Still, it cannot be denied the cases resolved on the basis of this generality all dealt with crimes that were mutually exclusive. Such, however, is not the case here.

In this case, the charges were submitted to the jury in rather precise language. As specifically appears in the court's written charge, *Count I* – the Aggravated Arson charge was said, by the trial judge, to be based on the State's contention that the defendants on "October 6, 1977, unlawfully and purposely and by means of fire or explosion, knowingly created a substantial risk of physical harm to Daniel J. Greene..." (R 7640). *Count II*, the Aggravated Murder Charge [5] (–that is, the charge that the defendants actually *caused* the death of Daniel Greene on October 6, 1977) was said to have occurred "while [they] were committing or attempting to, or while fleeing immediately after committing or attempting to commit aggravated arson" (R 7641).

As to *Specification One* under the Aggravated Murder charge (Count II), it was stated without equivocation, "that *the offense above [i.e., the aggravated murder]* was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated arson" *(ibid* [emphasis supplied]). *Specification Two* stated the Aggravated Murder charge particularized in Count II was committed "for hire" *(ibid)*.

[5] The court *categorically* charged the jury that "Aggravated Murder, under the facts of this case, is the purposeful killing of another while committing Aggravated Arson". Continuing, the court specifically and most unequivocally indicated to the jury that:

> "[The] elements of the offense of Aggravated Murder in this case are as follows:
>
> (1) Purposely cause the death of another:
> (2) while committing;
> (3) aggravated arson."

In a further instruction given at this juncture, the court stated " 'purpose' is a decision of the mind to do an act with a conscious objective or producing a specific result -- in this case, killing Daniel J. Greene."

Again, the Record is clear. Both Lanci (R 7702-7703) and Ciarcia (R 7703-7704) were acquitted of Aggravated Arson and the two specifications under Count II of the Aggravated Murder charge.

Given the fact that the evidence in this case shows beyond dispute that Danny Greene died (as put by the Coroner and further established by a virtual mountain of evidence) as a direct consequence of being blown up--an act of Aggravated Arson in its most elementary sense, no one can possibly argue such was not the *cause* of Daniel Greene's death.

So postured, the effect of these acquittals is that there is simply no way anyone, including the court, and certainly not the prosecutors in this case, can ever formulate even a hypothetical pattern which could have lead the jury to reach, by an appropriate reasoning pattern, the required conclusion that Lanci and Ciarcia *caused* the death of Danny Greene as indicated in the jury's verdict.

In segment V of its Opinion (Appendix, p. A7), the court simply forced the *peculiar* facts here involved into a simple mold and then resolved the issue against the Lanci and Ciarci on the basis of general principles. While we surely recognize the *general* rule with reference to inconsistent verdicts, and we are keenly aware of all cases cited by the court along with many others, still it is our opinion the cases relied on by the court are beside the point. In addition, more than logic is offended by resolving this case on the basis of the authorities relied on, or on the basis that "no internal inconsistency" was present, within the aggravated murder verdict. was present, within the aggravated murder verdict.

Despite the court's apparent confidence in the position it has adopted, one wonders why no references were made to any of the various cases cited to that court in the Briefs filed by the appellants. It had been hoped that the court would at least discuss the possible impact of *Ashe v. Swenson*, 397 U.S. 436 (1970). Especially given our contention, made

there and here, that the cases relying on the *Dunn* approach (and such is certainly true of the Ohio cases cited by the court) all deal with crimes that were "mutually exclusive." Here, of course, even a cursory reading of the Record shows these appellants were found *not guilty* on a count and a specification which were identical to essential elements of the crime for which they were convicted.

Perhaps the closest case to what we have here that can ever be found is *State v. Fling*, 69 Ariz. 94, 210 P. 2d 221 (1949), a case that expressly followed the rationale used in the *Hamilton* case cited to the appellate court *(Appellants Brief*, p. 44). In *Fling*, the court dealt with an *aggravated* assault conviction in which the *aggravation* was charged as being the fact that the defendant assaulted the victim *in his home*. The jury had acquitted Fling on a separate charge of assault with a deadly weapon. Based on the evidence, if an assault took place *in the home*, it was with a deadly weapon.

It was based on these facts that the court dealt specifically with the following proposition:

> "[W]here two or more crimes involve an element essential to each, an acquittal on one bars a conviction on the other, provided the evidence of the essential element is the same in each case." *Fling*, at 223.

In resolving the issue, the Arizona Supreme Court concluded that:

> "...[T]o sustain...[the] aggravated assault charge, it...is essential that an assault should have occurred in the home. Under the State's evidence the only assault in the home was with a deadly weapon, but the verdict negatives such an assault" *(id.*, at 223).

Thus the court concluded the verdicts were irreconcilable and contradictory and, for that reason, invalid. The bottom line on that court's position, in which it dealt with the *Dunn* and *Steckler* cases relied on by this court, was that:

> "Whenever a jury finds the defendant not guilty of a count in which is charged an act which forms an essential element of another count, a conviction on the second count cannot be sustained." *Fling*, at 224.

This point the Arizona Court backed up with a reasoning pattern that seems especially compelling:

> "The not-guilty verdict established that the defendant made no assault with a deadly weapon, and, as a necessary consequence, that he made no assault in the home. The issue was clear cut: its determination was solely within the province of the jury. The finding of the jury is conclusive. *The guilty verdict, having no factual basis, is nullity." Fling*, at 224.

Hopefully, a fuller consideration of this case than was given by the court of appeals will impel this Court to adopt a more enlightened approach to this issue, one that does not offend due process. Surely such is needed for a number of reasons and this case is ideal for that purpose.

In any event this case, perhaps more than any other in recent years, exposes the wrongs done in individual cases when extremely complicated and sophisticated issues are resolved as they were here – on the basis of general principles. Here we refer to the appellate court's treatment of the analytical problems involved in the various contentions made by the petitioner Lanci concerning the "inconsistent" and "repugnant" verdicts in this case. For, while critical aspects of this issue have produced considerable literature (see *e.g.*, Anno, 18 A.L.R. 3d 259 [1968]), such did not cause our court any problem. For them the problem was both routine and simple.

But, of course, this really is not the case for there has been much confusion and many conflicts in this area. Most of it was spawned by the decision of *Dunn v. United States,* 284 U.S. 390 (1932). Significant here, it was from *Dunn* that our court extracted a Hornbook principle and, without any analysis, rather arbitrarily concluded the presence of the gross inconsistencies in these verdicts were inconsequential. For our part, the peculiar facts in this case show out-and-out acquittals for the crime of Aggravated Arson. Guilt of the crime of Aggravated Arson was a most essential element of the crime for which the petitioner was indicted and ultimately convicted -- that is, causing the death of a Danny Greene while committing Aggravated Arson. This being so, the critical questions here cannot be regarded as controlled by the mere citational reference to the *Dunn* decision. Simply put, the pivotal issue can be stated as follows: can a conviction survive constitutional scrutiny where there has been a clear-cut acquittal on a specific charge that was an essential element to, and inherent in, the charge for which the conviction occurred?

Contrary to the court of appeals, whose conclusory reasoning pattern stops with *Dunn v. United States,* ours begins with *Dunn.* A reading of *Dunn* shows the Court affirmed his conviction for maintaining a nuisance by the possession of liquor for sale despite the fact that Dunn was acquitted of possessing the same liquor for sale. A study of the decision shows it was grounded on two rationales. *First,* the Court, relying on the rule that issues that were resolved in one trial "[may] not be pleaded as *res judicata* in a second trial," concluded that "each count in an indictment is [to be] regarded as if it... [were] a separate indictment" *(id.,* at 393-394). *Second,* the Court credited the jury's verdict with a sanctity that prohibits inquiry into possible mistakes or compromises. As put by the Court, "verdicts cannot be upset by speculation or inquiry into such matters" *(id.,* at 394).

Starting with *Dunn's* "separate count" rationale -- that is, that courts need not concern themselves with considering the logic of jury verdicts; it can hardly be denied that the major premise relied on for this holding in *Dunn* has been seriously undermined and undercut by the more recent development in the law of collateral estoppel. Here we refer to such cases as *Ashe v. Swenson,* 397 U.S. 436 (1970), and *Sealfon v. United States,* 332 U.S. 575 (1948). It is our considered judgment that these cases (particularly *Ashe v. Swenson* which was cited to the courts below) have decimated and fully confuted the foundations of the *Dunn* decision which were erected on the Court's premise that the ability to relitigate the same issues and reach opposing results in separate trials should be extended to multiple counts in a single trial. See *United States v. Zane,* 495 F. 2d 683, 691 (2d Cir. 1974), where the court reasoned that a conviction on substantive counts was viewed as inconsistent with acquittal on a conspiracy count when such acquittal "constituted a determination favorable to the petitioner on the facts essential to conviction of the substantive offense."

As to the other rationale of *Dunn* (to the effect that most inconsistent verdicts are simply benign gestures of mercy on the jury's part), such must be deemed an assumption, at best. Specifically, an assumption that has never been tested or proven. Aside from the fact that reliance on any assumptions to justify a verdict would be a serious affront to constitutional principles, *In Re Winship*, 397 U.S. 358 (1970); it can hardly be denied that jury inconsistencies such as we have here could very well signify that the jurors were not convinced of the accused's guilt of any crime beyond a reasonable doubt. In the wake of this possibility, only a prosecutor would argue that the risks inherent in accepting inconsistent verdicts are outweighed by the considerations supporting acceptance of inconsistent verdicts on the basis of an unproven assumption.

Stated another way, and this is the essence of our contention on this point because it also exposes the basic weakness in the appellate court's summary treatment of this issue,

given the context in which we have shown the verdicts here are both "inconsistent" and "repugnant," it is simply no answer to remit us to *Dunn* as being dispositive. For our part, the inconsistent verdicts returned by the jury in this case *on the identical facts* alone create a reasonable doubt as to Lanci's guilt of any crime.

III. An Accused Is Denied Due Process, And Otherwise Substantially Prejudiced, When Any Of The Following Circumstances Develop Or Occur:

(A) The State argues in support of the admission of evidence showing other crimes, wrongs or "similar acts," that such evidence is properly admitted: (1) as evidence generated in furtherance of a "conspiracy", (2) as evidence of "similar acts," and (3) as evidence tending to prove the existence of a criminal syndicate and thus a violation of a statute later declared unconstitutional and the trial judge fails to prevent the possible misuse of such evidence by the jury.

(B) There is admitted as substantive proof considerable evidence showing other crimes and wrongs, which evidence did not qualify for admission under the State's similar acts statute (R.C. of Ohio, §2945.59), the statute under which such evidence was tendered.

(C) Assuming the evidence referred to above qualified for admission under the above-indicated statute, the admission of such evidence as substantive proof of the charges made in the indictment cannot be justified in law, logic or common sense.

In this case, the trial court, in our judgment simply because the State was adamant about their wanting to do so, allowed the State to present considerable evidence that did not bear directly on the charged crimes. Here, we refer to certain testimony by Louis Aratari dealing with "subsequent acts after October 6th" (R 2199-B), the day of the Greene bombing, and testimony by the Rabinowitzs and others dealing with certain sealed FBI documents.

The State indicated, at one point, that some of this evidence was admissible under the "similar acts statute" (R 2199-E). The view was further articulated that the State had "shown *prima facie* evidence of a conspiracy to kill the Irish Gang" (R 2199-F). In the prosecutor's judgment, part of that conspiracy "was the death of Danny Greene, and the continuing course of that conspiracy...was up until February 28, 1978, when... Aratari was arrested in Middleburg Heights carrying fruits of the crime of conspiracy to engage in Organized Crime"[6] *(ibid).*

Further amplifying these remarks, while actually exposing his lack of knowledge even as to some of the most elementary tenets of conspiracy law, the prosecutor taxes our credulity by taking us full circle with the sagacious observations that the "law of Ohio indicates that under the criminal syndicate charge the persons involved in the conspiracy need not know the identity of each other... [and that acts of the ilk here involved] can be brought in during the continuing course of the conspiracy up until after the cover up phase" (R 2199-P).

(A)

Among the patent flaws in the prosecutor's sermon is the fact that the indictment did not charge conspiracy as an offense. Thus the conspiracy concept was only applicable here from an evidentiary standpoint. And, the prosecutor's two crimes were separate and distinct; hence, there was no merger of the conspiracy into the agreement implicit in the idea of five (5) or more people that was required to form an illegal gambling business (420 U.S., at 791).

In *Jeffers,* the facts show he was named in two indictments. *One* indictment charged Jeffers, along with nine (9) others, with conspiracy to distribute drugs (21 U.S.C. §846). The *Second* charged that he had acted "in concert with five or more other persons" in a continuing criminal enterprise (in violation of 21 U.S.C. §848). Jeffers was convicted in both cases despite his double jeopardy contentions. These same contentions were rejected by the Supreme Court.

[6] Indeed, contrary to the ravings of the prosecutor, there is no such crime in this State known as "conspiracy to engage in Organized Crime." See *R.C. of Ohio,* §2923.01.

Given *Iannelli* and *Jeffers*, the prosecutor's argument that (for aught that appears) was adopted by the trial court as the reason for allowing the evidence being assailed here simply cannot be validated.

Stated another way, any conspiracy to kill Danny Greene or even a conspiracy to form a "criminal syndicate" must be viewed as separate and distinct crimes. This being so, it defies logic to justify the admission of such evidence as acts or declarations made in furtherance of the "conspiracy" involved in the killing of Danny Greene. And, it is even more ridiculous to urge that such evidence was admissible to prove the existence of a "criminal syndicate" that had as its purpose gambling activities.

This brings us to still another segment of the prosecutor's stated basis for the admission of the evidence being assailed. Here we refer to his ramblings about a "cover up phase" or concealment phase of "the conspiracy" (R 2199-O to 2199-P). It can be taken for granted the prosecutor never even heard of *Gruenwald v. United States*, 353 U.S. 391 (1957). For if he had, there is no way such an argument could have been made in face of the principle that:

> "After the central purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." (353 U.S., at 401-402.)

Still other statements by the prosecutor betray him as being misinformed. Here, in referring to the stolen FBI documents, he argued "the charge here is maintaining a criminal syndicating... and it is our contention that these documents were stolen for the purpose of maintaining a criminal syndicate. That is the reason for it" (R 2199-J to 2199-K).

Here we start with the fact that the court ultimately determined (R 5749) there was no evidence showing the existence of a "criminal syndicate," as that entity was defined in our statutes, *R.C. of Ohio*, §2923.04(C). Despite this holding, the court was convinced by the State to allow evidence showing the corruption of the Rabinowitz and the theft and retrieval of certain documents stolen from the FBI. The fact that the jury regarded this evidence as substantive proof against those on trial is only an aspect of the problem.

Since the defense had sought by a Motion in Limine (R 3533) and by a Motion to Strike (R 3800), and otherwise to exclude and restrict this evidence, such efforts should emphasize the intensity of our present complaint. For the harm this evidence did to Lanci's defense is most evident.

The prosecutor argued the FBI documents and the testimony relating to them "were part of the conspiracy to kill Danny Greene, and the conspiracy to participate in Organized Crime in the Cleveland area" (R 3564). The Record, of course, shows a continuing objection to the entirety of this evidence (R 3611-3612). This position the defense augmented with the specific contentions that none of this evidence had any "concern with the death of Danny Greene and that... [even the witness, Mrs. Rabinowitz had], admitted that there was no information sought [from her] relating to Mr. Greene..." (R 3800.) These observations, joined in by Lanci's counsel (R 3802), were further coupled with the request that the court give a limiting instruction (R 3800-3801). None was given.

(B)

Again, the prosecutor's response to all this shows he was literally confounded by the complicated evidentiary problems involved in this case. Here, he stated that it would be proper for the court to charge with reference to this evidence under §2945.59 (R 3802). In our judgment, this particular statement is verification of his total obliviousness to the fact that this evidence, if it was admissible on the theory that such activity occurred in furtherance of a conspiracy (as the

State repeatedly argued), was admissible as substantive evidence. Evidence admissible under §2945.59 is for a very limited purpose and not as substantive proof that the accused committed the crime charged. See *State v. Curry*, 43 Ohio St. 2d 66 (1975). In *Curry*, this Court expressly approved the appellate court's reversal in the following language:

> "Where evidence has been admitted for a limited purpose, which the state claims shows that the defendant did certain 'other acts' which show the motive or intent of the accused or absence of mistake or accident on his part or the defendant's scheme, plan or system in doing the act alleged in the indictment, such evidence must not be considered by the jury as any proof whatsoever that the accused did any act alleged in the indictment." *Id.*, at 74.

It cannot be denied, as our court of appeals has so cogently recognized in *State v. Roberts*, 62 Ohio St. 2d 170 (1979), the danger of a "spillover" effect, which can be contrasted with the effect related to evidence showing a "criminal propensity" is "exemplified by a situation in which 'the evidence as to each charge is not readily referable to the crime with respect to which it is introduced.' " *Id.*, at 4.

Doubtless, it was because of the above indication by the appellate court of the existence of a "spillover" problem in cases of this ilk (especially when there is also involved aspects of our "similar acts" statute) that the court specifically determined that:

> "In a joint trial of two or more offenses, any doubt that the R.C. §2945.59 evidence is simple, distinct, and readily referable to the charge with respect to which it is introduced must be resolved in favor of the accused. All potentially relevant factors should be considered to determine whether there is a substantial likelihood that prejudice will arise. The potential for prejudice must be under constant scrutiny during the trial. Appropriate measures must be taken at trial if prejudice surfaces or a substantial likelihood exists that it will." *State v. Roberts, supra*, at Syllabus 3.

What surfaces from these cogent references to *Roberts*, when the same are related to the facts here *and* to the various arguments made elsewhere in this Memorandum, are certain required conclusions. *One*, the trial court admitted as substantive proof the Aratari testimony relating to his efforts to eliminate Brian O'Donnell and Keith Ritson; as well as, the testimony showing the Rabinowitz caper. The entirety of this evidence dealt with inferences, which can in no way be regarded as "simple and direct" *Two*, the trial court did absolutely nothing to reduce the obvious potential for prejudice created by this evidence. This is so even if the evidence was proper for the jury to consider for any purpose against any defendant. And, *three*, as a consequence of the above-indicated facets of this case, the jury's consideration of this evidence must be regarded as having occurred in violation of due process. *Drew v. United States*, 331 F. 2d 85, 88 (D.C. Cir. 1964) and *United States v. Lee*, 428 F. 2d 917, 921 (6th Cir. 1970).

It may suffice, and hopefully it does, to suggest that based on the decisions of *State v. Curry*, 43 Ohio St. 66 (1973) and *State v. Flonnory*, 31 Ohio St. 124 (1972), this Court truly felt the problems attendant to the use of our similar acts statute (§2945.59) had been identified and resolved. Doubtless too, this Court felt, as did most defense counsel, that absent a real *necessity* to establish some relevant material fact (and those are specifically set forth in the statute itself) such evidence is simply not admissible. And, this Court was probably encouraged in this belief by such cases as *State v. Smith*, 59 Ohio App. 2d 194 (1977), and even from reading *State v. Roberts*, Cuy. Cty. No. 37848, in route to your decision in the same case (62 Ohio St. 2d 170 [1980]). But as this case clearly shows, hopefully not because the great public and general interest blinded the court, the lessons thought to have been learned were simply ignored by the court of appeals below.

[7] Indeed, it is most significant that another of the prosecutors involved with the Greene murder trials, in dealing with *some* of this same evidence, argued to our appellate court that "the trial court [in the previous trial] properly limited both the State and the defense to that evidence that was relevant to the murder of Greene. The fact that Aratari got grenades from Cisternino to kill Ritson, or that he was arrested while on the prowl to kill Brian O'Donnell are totally irrelevant to the issues of this case." *State v. Carabbia*, No. 39916, *Answer Brief*, pp. 36, 39.

As is well known by those with any real experience in trying cases, there is a recognizable penchant, or proneness, for jurors to draw incorrect or illogical inferences from such evidence. Since the jury here was not given the proper guidance, even assuming the evidence herein being specifically assailed was admissible for the purpose suggested in the Opinion, it is simply no answer to say this was the fault of defense counsel and, for that reason, justice was not offended.

(C)

In this case, certain facts are clear beyond dispute. These include (a) the trial court's failure to indicate under what theory it admitted this evidence and, (b) the court's failure to give any limiting instruction to the jury. See *State v. Curry, supra,* and *State v. Flonnory,* 31 Ohio St. 2d 124 (1972).

Also *Ohio Revised Code* §2945.59, the statute relied on by the appellate court to blame defense counsel because considerable evidence was not properly restricted, simply does not confer any arbitrary discretion on the trial judge to admit evidence that qualified under the statute. Proof this is so, despite the willingness of the court of appeals to ignore this fact, is most apparent from the legislature's specific use of the discretionary word *may* in the statute with respect to the admissibility of such collateral proof.

Despite then, the contrary notions of the court of appeals, obviously what this legislature must have anticipated is that when the prosecutor invokes §2945.59 as the basis for admission of specific evidence, the trial judge must satisfy himself that the threshold prerequisites have been satisfied. This is surely different from saying, as was said here by the appellate court (Appendix "C", p. A3), that when evidence offered as substantive proof is objected to the defense must,

even if the objection is rejected, anticipate at the risk of being prejudiced that if the trial judge is wrong in his ruling on their objection, the evidence might nonetheless be proper for some collateral purpose.

Obviously then, this evidence cannot possibly be qualified for admission under *Curry*. On the other hand, assuming *arguendo* this evidence passes the *Curry* test, the failure of the court to conform to the requirements of *Flonnory* must still be reckoned with. Here we refer to the rather precise holding by our Supreme Court to the effect that:

> "Where evidence has been admitted for a limited purpose which the state claims shows the defendant did certain 'other acts' which show the motive of intent of the accused, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question which is alleged in the indictment, the jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment."

To be sure, it is a venerable principle that bars the use of evidence showing extrinsic offenses and acts of wrongdoing solely to demonstrate a defendant's bad character or to merely show simply that it is more likely than not the accused committed the particular crime then being tried. Such evidence is deemed inherently prejudicial. See *E.g.*, *Michelson v. United States*, 335 U.S. 469, 475-476 (1948). Thus, the law is that without an issue to which such evidence is relevant, the probative value of any such evidence is simply outweighed by this prejudice. Obviously then, the trial court should have first determined that this evidence was relevant to an issue in this case. Next, the court was required to make the determination that the probative value of this evidence was not outweighed by its undue prejudice.

The trial court not only failed to do any of these things, he also failed to give the jury any instruction as to any limited purpose such evidence may have served.

On the other hand, the clear impact of *State v. Curry, supra,* on *R.C. of Ohio,* §2945.59, clearly suggests, although it should be required, that when evidence is admitted for one of the purposes enumerated in the statute, the trial judge should articulate a statement showing his balancing of probativeness and prejudice. See *United States v. Mahone,* 537 F. 2d 922, 929 (7th Cir. 1976). *Cf., United States v. Sangrey,* 586 F. 2d 1312, 1315 (9th Cir. 1978).

Unfortunately, much confusion has continued to prevail with reference to the proper use of this statute. This is so despite some rather clear expressions by this Court (see, *e.g., State v. Flonnory,* 31 Ohio St. 2d 124 [1972]; and *State v. Hector,* 19 Ohio St. 2d 167 [1969]). And, if this case is any index, it is most clear the message seemingly has not gotten across to some of our prosecutors and trial judges.

Despite this fact, it was very recently recognized by another court in this State that, "evidence which of itself shows or tends to show the accused did some act for which he is being tried is admissible without limitation. It does not depend upon *R.C. of Ohio,* §2945.59 for admissibility." *State v. Smith,* 59 Ohio App. 2d 194 (1977). Significantly the *Smith* court specifically noted, in its syllabus, that:

> "Where the state presents testimony, without limitation, against an accused pertaining to his commission of other crimes, for which he has not been indicted, and the crimes bear no relevance to an element of the offense with which he is charged, the court's admission of such evidence is prejudicial error."

Faced with the reasons given by the State as to why this evidence was admissible (R 2199-E, 2199-F, 2199-J to K, 3564, 3611-3612), and the stern contentions by the defense that it was not admissible for such purposes (R 3533, 3601, 3612 and 3800), this evidence can only be said to have been admitted for the reasons urged by the State. The upshot of this required conclusion is, at least, two-fold. *One*, to the extent the trial court may have deliberately failed to indicate his own rationale in order to give any reviewing court the option of: (a) seeking some possible basis under which admission could be justified, and then attributing it to him; or (b) declaring the admission to have been, in any event, harmless error; the Court should, of course, recognize the prejudice visited upon those then being tried as having been gross. *Two*, the prosecutor having insisted to the extent that he did on polluting, and otherwise cluttering up, this Record with this collateral evidence, any argument by him that it was harmless should be regarded as insulting.

As to these points, the law seems to be most clear. It is regarded as "unfair for a reviewing court to consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial." *United States v. Check*, 582 F. 2d 668, 683 (2d Cir. 1978). Also see *United States v. Brown*, 490 F. 2d 758, 763 (D.C. Cir. 1973), and *United States v. McClain*, 400 F. 2d 241 (D.C. Cir. 1971). The appropriateness of this idea here can only be augmented by references the *Check* decision makes to the rather sagacious remarks of Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case) that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Id.*, at 102-103.

The point involved in our emphasis of these latter arguments relates to the fact that the prosecutor will be

required to seek some basis, other than those advanced by him at trial, to justify the unfettered admission of this evidence. This being so, it seems only proper that he should specifically respond to the tenets articulated above rather than simply parrot for us a collection of general principles translatable into the idea that the admission here was discretionary or, in any event, harmless.

Stated another way, "[t]his Court is certainly entitled to expect candor from attorneys representing...[the prosecution]." *United States v. Ott*, 489 F. 2d 872 (7th Cir. 1973). Since it is so apparent the prosecutor, by the force of his ill-advised arguments, improperly prevailed upon the trial court to admit evidence for reasons that cannot be justified, full candor should require him to confess error. But, obviously this is really asking too much for we have already seen where one prosecutorial team argued to the court of appeals that some of this same evidence was not relevant, and the prosecutors in this case argued that it was.[8]

Next, it was under segment VI of the Opinion dealing with this proposition that the appellate court's reasoning reaches its zenith. Here again, the court imputes blame for the lack of needed instructions to those being tried. In convincing itself this was an appropriate conclusion, the court started its critical syllogism with what can only be regarded to be a flagrantly false premise. For the Record simply *does not* support the conclusion that "evidence of the other crimes, committed by the various principals involved in the evidence therein, was admissible against these appellants under *R.C. of Ohio*, §2945.59" (Appendix "C", p. A3).

Chief among the problems with the court's ratiocinations are certain irrepressible considerations: (1) *most* of the evidence was not offered by the State on the basis of §2945.59 (see *e.g.*, R 2199-2199/K); and (2) limiting instructions were specifically requested (R 3533) as were objections and motions to strike (R 3800-3801) made with reference to this testimony. In addition, the Record also fails to show that the bulk of this evidence was admitted for *any* of the collateral purposes indicated in the statute.

8 "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That (inconsistency between the actions of different prosecutors) was inadvertent does not lessen its impact." *Santobello v. New York*, 404 U.S. 257, 262 (1971).

But, even this is not all. To simply conclude the evidence was admissible for a limited purpose and was only considered as substantive proof because counsel did not request the appropriate limiting instruction, only begs the question. That question, simply put, is: Did the jury's consideration of this evidence as substantive proof deprive these appellants of a fair trial? If the answer to that question turns (as the court says it does) on the fact that defense counsel did not sufficiently object, then the conclusion is inescapable this petitioner *was denied the effective assistance of counsel.* This, in turn, is a consideration that must be deemed to have been rejected by our appellate court in the overall conclusion that no plain errors under Rule 52 are present anywhere in this case. As we see it, however, the position taken by the court in this instance punishes the accused because their counsel did not do a vain act.

IV. An Accused Is Denied The Effective Assistance Of Counsel (A) When, As A Result Of His Counsel's Failure To Request Instructions Limiting Such Evidence To The Purposes Enumerated In §2945. 59, Considerable Evidence Was Considered As Substantive Proof Of The Charges For Which The Defendant Was Convicted; And (B) When, As A Result Of Counsel's Failure To Request An Instruction, Evidence Admitted Solely On The Basis Of A Charge For Which The Court Acquitted The Defendant Is Permitted To Be Considered By The Jury As Substantive Proof Of The Charges.

An indisputable fact in this case centers on the idea that the credibility of Aratari and Guiles was absolutely essential to a successful prosecution. To the extent their credibility was bolstered and corroborated by inadmissible evidence, by evidence arbitrarily and unilaterally considered by the appeals court to have been admitted for limited purposes unrelated to their credibility, or by the believability of their testimony with reference to facts and events that properly should have played no part in the trial itself; the errors involved could not possibly be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967). Also see *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Our analysis of the above proposition starts with the idea that it surely is not the perogative of the appellate court to usurp the function of the jury and speculate whether, without the evidence wrongly admitted as substantive proof (as they put it, because counsel failed to object), the verdict would have been the same. Obviously then where, as here, prejudicial (or potentially prejudicial) evidence was improperly admitted, which admission was further augmented by the occurrence of other flaws, the assessment of their harm-

ful character is not only beyond the comprehension of appellate judges but anyone else's. This truly must be so unless the judges resolve themselves into a jury and ignore the findings based on incompetent evidence and significant flaws.

Our point is that regardless of whose fault it was that such happened, ultimately considerable evidence was offered by the State as substantive proof, was admitted as such by the court, and was so considered by the jury. Simply put, since the appellate court has affirmatively concluded that "much" of this assailed evidence was admissible for certain limited purposes (Appendix "C", p. A3), or would have been excluded if defense counsel had asked, amplifies the wrongs done this petitioner. This is so because, assuming this to be true *(i.e.*, that the court would have so instructed the jury), to penalize those on trial personally because their attorneys did not convince the trial court (despite counsels' correct objections to the evidence as offered) to admit some of this evidence as proof against their clients for such limited purposes really asks too much. *Cf., State v. Smith*,[10] 59 Ohio App. 194 (1977). The bottom line thus appearing is that the court of appeals was quite willing to offend the principle that appellate courts should not "consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial." *United States v. Check*, 582 F. 2d 668, 683 (2d Cir. 1978). Also see *United States v. Brown*, 490 F. 2d 758, 763 (D.C. Cir. 1973), and *United States v. McClain*, 400 F. 2d 241 (D.C. Cir. 1971). The appropriateness of our criticism of their position can only be augmented by references in the *Check* decision to

[10] In *Smith*, contrary to the position taken by our Court of Appeals, it was concluded:

> "Where the state presents testimony, without limitation, against an accused pertaining to his commission of other crimes, for which he has not been indicted, and the crimes bear no relevance to an element of the offense with which he is charged, the court's admission of such evidence is prejudicial error."

certain rather sagacious remarks by Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case), that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Id.*, at 102-103.

Even this is not all. Our position here can be analogized to that very recently expressed in *United States v. Cain*, 587 F. 2d 678 (5th Cir. 1979). In that case, the court concluded that where cogent evidence (if admissible at all) is admissible for a very limited purpose, the danger of the jury misusing such evidence is simply too great to leave the accused unprotected by a sufficient instruction. Also see, *United States v. McClain*, 400 F. 2d 241, at 246 (D.C. Cir. 1971).

Our great fear here is that both of the courts below allowed both their's and the public's natural antipathy toward "organized crime" to cloud their perception of due process in these notorious "Danny Greene Murder" trials. For, it is at least arguable that the courts succumbed to the notion that "ornithological specimens of identical plummage congregate" and, for that reason, they rationalized that the appellants then before them received the justice they deserved. For our part, we shall continue to subscribe to the principle that the rights of the very best among us are only as secure as those of the worse are protected.

What is required here, which was apparently not done by the appellate court, is a gauging of the impact of the contention (made to the court in the Application for Reconsideration) that to the extent Lanci was prejudiced as a consequence of his trial counsel's failure to protect him in the instances noted by the court, he was denied the *effective assistance of counsel.*

In assaying these specific contentions, this Court should recognize that The Supreme Court has yet to authorize the use of the harmless error doctrine, or the aspect thereof, patterned by the appeals court in this case as the lack of a "manifest miscarriage of justice, to effective assistance of counsel contentions." Doubtless this has been so because, to them, the "overriding concern has always been the justice of the finding of guilt" *(United States v. Agurs,* 427 U.S. 97, 112 [1976]). Or, to put it otherwise, "the ultimate question of guilt or innocence...should be the central concern of a criminal proceeding." *Stone v. Powell,* 428 U.S. 465, 490 (1976).

Under this analysis, the Court would necessarily conclude that *if* counsel can be charged with having failed to request that evidence admissible in favor of §2945.59 be limited, then it follows Lanci was denied the effective assistance of counsel. The same conclusion would follow if it was counsel's responsibility to request the court take the appropriate action with reference to evidence admitted *solely* on the basis of the Organized Crime charge.

The cogency of this conclusion results from the fact that the assailed proof entailed the very real risk and danger, even if the jury had been properly instructed, that they would be confused to the detriment of the accused if called on to make conflicting interpretations of these essentially collateral events.

For our part, anyone who reads the Opinion below as it should be read, with a concern as to whether Thomas Lanci has been accorded due process, very quickly realizes critical aspects thereof were based on a rule structured toward a conclusion of harmlessness with reference to the presence of errors and flaws in the trial under review. For, if it were otherwise, rather than arbitrarily conclude, as it did: (a) that it was the fault of the defense counsel that the considerable segment of prejudicial evidence was admissible if limited to the appropriate collateral purposes (as it should

have been, if admissible at all), *and* (b) that the trial judge would have excluded other evidence admitted solely on the basis of the Organized Crime charge that was dismissed by him had the defense made the request; the court would have taken a vastly different approach.

What is being referred to is the tenet that "it is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial" *(Lakeside v. Oregon,* 435 U.S. 333, 341 (1978). In addition, it can hardly be denied that the prosecutor is under no less of a duty to see that the trial conforms to constitutional standards since his interest in a criminal prosecution is not that he shall win a case, but that justice shall be done. *Berger v. United States,* 295 U.S. 78, 88 (1935).

Yet, one gleans from even a cursory reading of this Opinion that, in determining that the undeniable misuse of evidence (evidence that was grievously prejudicial in our judgment) was harmless, the court of appeals focused exclusively on whether the verdict was supported by sufficient evidence. For our part, given the serious contention made to the court below that *if* Lanci's counsel can be properly faulted for not having taken the appropriate action in the specific areas delineated by the appeals court in its Opinion, then that court could not properly conclude Lanci was *not* prejudiced by these failures by his defense counsel.

(See Appendix "C", p. A3). This reasoning pattern is particularly compelling here since more emphatic proof of prejudice may well be absent from the Record precisely because counsel was ineffective. Alternatively then, the further contention being made is that where, as here, the ineffectiveness claim is founded on *omissions,* rather than specific acts of commission, counsel's ineffectiveness so permeates the adjudicative process itself that there is simply no way any court can realistically assess an incompetency of counsel claim as harmless by looking to the sufficiency of the evidence of guilt in the Record. This is so most of all because counsel's ineffectiveness *may* have so distorted the Record that it becomes an unreliable indicator of guilt itself. See *Holloway v. Arkansas,* 435 U.S. 475, 490-491 (1977).

Since it is literally impossible to gauge the prejudice that resulted from counsel's omissions, as The Supreme Court has made most clear, "The right to have the [effective] assistance of counsel is too fundamental to allow courts to engage in nice calculations as to the amount of prejudice resulting from its denial." *(Id.*, at 488.) Indeed, it must be regarded as clear from these cases that, at least as to our ineffective assistance claims, The Supreme Court has concluded such a showing "can never be treated as harmless error." *(Id.*, at 489, quoting *Chapman*, 386 U.S., at 23).

This reasoning looks then to the only conclusion that can accommodate these facts, a reversal is required.

CONCLUSION

In all deference to the Ohio Court of Appeals, its decision in several highly significant areas cannot survive scrutiny. Because this is so, our challenge as against some of their reasoning patterns has been with arguments that can possibly be viewed as aggressive criticisms. As to this very real possibility, it is hoped the Court will understand we were guided by the perogative of counsel to vigorously assert with candor, however blunt, what he believes to be valid criticisms of judicial action taken with reference to his client's liberty.

We started with the appellate court's unambiguous recognition that certain flaws occurred in the trial leading to these convictions. For our part, given these correct determinations, it is most difficult to understand how that court could still say, with any sense of conclusiveness of law or fact, that an affirmance here was nonetheless proper.

Our view, which clashes mightily with the court's, is that given the meaningful errors credited by the Court of Appeals, as being present, there is absolutely no way (from the fastness of an appellate court bench) the pulsebeat of the trial courtroom could be perceived with sufficient reliability to enable that court (or any court) to correctly determine that even had such errors *not* occurred, the jury's verdict would have nonetheless been the same.

What this suggests is that the court of appeals has simply closed its eyes to the probabilities of courtroom dynamics in this and in other areas of its Opinion. For, the trial court having granted the Motion for Judgment of Acquittal on the Organized Crime count, as it really should have done earlier when this same Motion was made at the close of the State's case, based on the flagrant lack of evidentiary support (*Jackson v. Virginia*, 443 U.S. 307 [1979]); the critical issues that emerged could not turn on whether it was the defense's responsibility to request that the trial judge take the appropriate action with reference to the evidence admitted solely on the basis of the Organized Crime charge. Yet, despite this obvious fact, the court of appeals arbitrarily satisfied itself that the responsibility for corrective action being taken rested ultimately with the defendants themselves to make a request. A significant upshot of the court's point in this regard is that it is proper that Lanci must personally bear the brunt of his counsel's failure to request the action needed to dull the impact of the evidence the jury had no right to consider.

The fact that *no action* was taken by the trial court, who was solely responsible for this evidence even being admitted in the first place (since he failed to heed numerous objections and Motions and failed to grant the Motion for Acquittal at the close of the State's case – as he should have), becomes a most critical circumstance since there is really no realistic way it can be said that the men on trial were not prejudiced by the jury's consideration of this evidence *as substantive proof*. Indeed, given the trial court's belief that the Organized Crime charge had not been made, there was a manifest necessity for the granting of a mistrial. Counsel's failure to request must be regarded as a further instance of *ineffective assistance of counsel*.

For all of these various reasons, certiorari should be granted.

Respectfully submitted,

A. RICHARD VALORE, ESQ.
Of Counsel

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 20th day of April, 1981.

/s/ JAMES R. WILLIS, ESQ.
Attorney for Petitioner